

Entered on Docket
December 22, 2008
GLORIA L. FRANKLIN, CLERK
U.S BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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CLERK
United States Bankruptcy Court
San Jose, California

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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 In re] Case No. 07-53166 ASW
11 SANGMUN KIM,] Chapter 7
12 Debtor.]
13 DONGJIN SEMICHEM CO., LTD.,] Adv. Proc. No. 08-5023
14 Plaintiff,]
15 v.]
16 SANGMUN KIM,]
17 Defendant.]
18

19 **MEMORANDUM DECISION**

20 Before the Court is the Application for Entry of Default
21 Judgment Against Defendant Sangmun Kim (the "Application") filed by
22 Plaintiff Dongjin Semichem Co., Ltd. ("Dongjin"). Dongjin is
23 represented by Attorney Craig C. Chiang of the law firm Buchalter
24 Nemer. Defendant Sangmun Kim ("Debtor") is representing himself in
25 propria persona. Having considered the Application, the supporting
26 declarations and the further pleadings in this and the underlying
27 Chapter 7 bankruptcy case, the Court finds that judgment should be
28

MEMORANDUM DECISION

1 entered against Debtor under Bankruptcy Code §§ 523(a)(2) and
2 727(a)(3).¹

3 This Memorandum Decision constitutes the Court's findings of
4 fact and conclusions of law, pursuant to Rule 7052 of the Federal
5 Rules of Bankruptcy Procedure.

6

7 **I.**

8 **FACTS AND PROCEDURAL BACKGROUND**

9 On January 31, 2008, Dongjin filed a Complaint to Determine
10 Nondischargeability of Debt Pursuant to 11 U.S.C. Section
11 523(a)(2), and (a)(6) and to Object to Discharge Pursuant to
12 Section 11 U.S.C. Section 727(a)(2), (a)(3), (a)(4) and (a)(5) (the
13 "Complaint"). The Complaint relates to an arbitration award in the
14 amount of \$944,696.46 issued in Dongjin's favor against Debtor on
15 July 9, 2007 (the "Arbitration Award").²

16

17 **A. Dongjin's Investment in Emailfund**

18 The underlying arbitration between the parties relates to
19 Dongjin's investment in a California corporation named Emailfund,
20 Inc. ("Emailfund"). Declaration of G. Forsythe Bogeaus in Support
21 of Application for Entry of Default Judgment Against Defendant
22 Sangmum Kim (the "Bogeaus Declaration") at ¶4. Dongjin is a large

23
24 ¹ Unless otherwise provided, all references to code sections
25 shall mean the Bankruptcy Code, codified in Title 11 of the United
States Code, 11 U.S.C. § 101, et seq., including all amendments
thereto.

26
27 ² A copy of the Arbitration Award is attached as Exhibit A to
each of the three declarations filed in support of the Application.

1 Korean corporate manufacturer of chemicals for the semiconductor
2 industry. Declaration of Chun Hyuk Lee in Support of Application
3 for Entry of Default Judgment Against Defendant Sangmun Kim ("Lee
4 Declaration"), ¶ 5. Emailfund "'engaged in research and
5 development of PDA security software technology'." Bogeaus
6 Declaration at ¶ 4 quoting October 10, 2005 deposition of Debtor.
7 By a stock purchase agreement dated June 24, 2000, Dongjin agreed
8 to invest in Emailfund (the "Agreement") to develop secure internet
9 software to be installed into a chip. Lee Declaration at ¶ 5.

10 Debtor "was the Chief Executive Officer of, and the President
11 and a Director of, Emailfund from its inception until at least
12 July, 2001." Arbitration Award at 1, Exhibit A to Lee and Bogeaus
13 Declarations. Debtor and Emailfund were determined to be alter
14 egos in the findings of the Arbitration Award. Id. at 5-6.

15 Under the Agreement, upon performance by Emailfund of certain
16 conditions, Dongjin was to make staged investments up to the total
17 sum of \$2 million in exchange for staged delivery of Emailfund
18 shares. Lee Declaration at ¶ 5. An initial \$200,000 was due and
19 paid by Dongjin upon the signing of the Agreement. Lee Declaration
20 at ¶ 18. An additional \$600,000 was due upon Debtor's assembly of
21 the team to bring the product into its beta phase. Id. Debtor did
22 not get the esteemed scientists he had represented would be on the
23 team, but assured Dongjin that the persons hired would be fine.
24 Based on this representation, Dongjin authorized the additional
25 \$600,000 transfer. Id. To obtain the next big chunk of the
26 investment funds, Emailfund had to provide a successful
27 demonstration of the beta phase of the product. Lee Declaration at
28

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1 ¶ 20. Such a demonstration was scheduled, but not successfully
2 completed in Dongjin's opinion. Lee Declaration at ¶¶ 20-23.
3 Dongjin asked for Emailfund's financial information from Debtor and
4 was rebuffed repeatedly. Lee Declaration at ¶¶ 24-27.

5 After Dongjin made an initial \$800,000 investment, Dongjin
6 asserts it then discovered that material representations made by
7 Debtor and Emailfund to induce Dongjin to enter into the Agreement
8 were false. Specifically, Dongjin alleges in the Complaint at ¶ 7
9 that Debtor made the following misrepresentations:

- 10 (1) Debtor and Emailfund developed an encryption technology
11 based on wireless technology as the first developer of
12 such technology in the world (see also Lee Declaration at
13 ¶¶ 6, 7 and 10; Bogeaus Declaration at ¶ 47);
14 (2) Emailfund owned numerous technology patents related to
15 encryption technology (see also Lee Declaration at ¶ 15;
16 Bogeaus Declaration at ¶ 47 citing Arbitration Trial
17 Transcript 3/26; 289:20-290-12);
18 (3) Debtor and Emailfund had a research center at Stanford
19 University in Palo Alto, California (see also Lee
20 Declaration at ¶ 9);
21 (4) Debtor and Emailfund had obtained the highest level of
22 wireless encryption technology in the world (see also Lee
23 Declaration at ¶ 10);
24 (5) Debtor and Emailfund were recruiting investment of
25 \$2 million for the further development of the "security
26 software" in return for 40% of the outstanding shares of
27 Emailfund (See also Bogeaus Declaration at ¶ 42, E); and
28

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(6) Debtor and Emailfund had already received investment of \$150,000 from Cess Telecom, Ltd. (see also Lee Declaration, ¶ 12).

Dongjin alleges, at paragraph 8 of the Complaint, that Debtor and Emailfund made the following further misrepresentations to Dongjin both in Emailfund's due diligence report provided to Dongjin, and orally:

- (1) Emailfund's researchers included Professor Phillip Rogaway, and Dr. Peter Landrock, well-known, prominent engineers in the field of encryption technology (see also Lee Declaration at ¶ 13; Bogeaus Declaration at ¶ 47 citing Arbitration Trial Transcript 3/28; 928:9-19);
- (2) Both Professor Rogaway and Dr. Landrock were and would be the core of the technology development team of Emailfund (see also Lee Declaration at ¶ 13; Bogeaus Declaration at ¶ 47 citing Arbitration Trial Transcript 3/28; 928:9-19);
- (3) Emailfund owed a number of technology patents including four specific patents related to wireless encryption technology (see also Lee Declaration, ¶ 15, Bogeaus Declaration at ¶ 47 citing Arbitration Trial Transcript 3/26; 289:20-290-12); and
- (4) Debtor stated that the investment in Emailfund would be very profitable investment in light of Professor Rogaway and Dr. Landrock being members of Emailfund's technology development team and Emailfund's key patents (Lee Declaration at ¶ 14).

Complaint at ¶ 8.

MEMORANDUM DECISION

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2 **B. The Arbitration and Bankruptcy Filings**

3 On March 1, 2002, Dongjin initiated an action against
4 Emailfund in the Orange County Superior Court seeking rescission of
5 the Agreement and damages for breach of fiduciary duty by Debtor.
6 Declaration of Paul Arrow in Support of Application for Entry of
7 Default Judgment Against Defendant Sangmun Kim (the "Arrow
8 Declaration") at ¶ 3; Lee Declaration at 28. This case went to AAA
9 international arbitration, in light of the binding arbitration
10 provision in the investment agreement (the "Arbitration"). Arrow
11 Declaration at ¶3, Bogeaus Declaration at ¶ 14. By order dated
12 December 6, 2004, Debtor became a party defendant to the
13 Arbitration. Bogeaus Declaration at ¶ 16. Trial in the
14 Arbitration was scheduled to commence on April 17, 2006. Arrow
15 Declaration at ¶ 5.

16 On April 14, 2006, both Debtor and Emailfund filed bankruptcy
17 petitions in the Central District of California. Id. "Venue was
18 alleged to exist there based on the location of a manuscript
19 allegedly written by the debtor in a bikini shop [owned by Debtor's
20 acquaintance] in Malibu, California." Complaint at 2:28-3:2; see
21 also Arrow Declaration at ¶ 7.

22 In his bankruptcy petition, Debtor's residence was listed as
23 being in Seoul, South Korea. Arrow Declaration at ¶ 5. His
24 occupation was listed as a mathematics professor at Yonsei
25 University in Seoul, South Korea. Id. Debtor's Schedules showed
26 he had real property valued at \$400,000, secured claims of
27 \$400,000, personal property of \$1,840,595 and general unsecured
28

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For The Northern District Of California

1 debts of \$1,313,549.18. Arrow Declaration at ¶ 6. On
2 June 12, 2006, Debtor's bankruptcy case was dismissed as a bad
3 faith filing and the court imposed a 180 day bar to refiling.
4 Arrow Declaration at ¶ 7.

5 On August 17, 2006, relief from stay was granted in the
6 Emailfund case to allow Dongjin to proceed with the Arbitration.
7 Arrow Declaration at ¶ 8.

8 Just a few days after the expiration of the 180-day bar, on
9 March 10, 2007, Debtor filed another bankruptcy case, this time in
10 the District of Massachusetts. Arrow Declaration at ¶ 10. Debtor
11 alleged venue in that district based on residence, domicile, place
12 of business or principal assets. Id. Dongjin determined on its
13 own that an individual named "Soon B. Kim" allegedly lived at the
14 Belmont, Massachusetts address given by Debtor in his petition.
15 Id. Debtor admitted in a declaration submitted in the Arbitration,
16 that he was working as a professor in South Korea at the time this
17 second bankruptcy petition was filed. Id. In this second
18 bankruptcy filing, Debtor's Schedules showed he had no real
19 property assets, personal property valued at \$207,050 and unsecured
20 priority debts of \$3,500 (plus a \$800,000 debt to Dongjin owed
21 jointly by Debtor and Emailfund). Id. at ¶ 11.

22 Dongjin obtained relief from stay in this second bankruptcy
23 and was allowed to proceed with the Arbitration. Arrow Declaration
24 at ¶ 12. The Arbitration was completed between March 26 and March
25 29, 2007. Id. at 13. On July 9, 2007, the arbitrator issued the
26 Arbitration Award in Dongjin's favor in the total amount of
27 \$944,696.46. Id. The basis for the Arbitration Award was
28

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1 Dongjin's claim for rescission of the contract due to failure of
2 consideration. Id. Specifically, the Arbitration Award found:

3 Emailfund is at fault for failing to make a good faith
4 effort to develop the product, and that this
5 nonperformance is sufficiently material to go to the
essence of the agreement such that there was a failure of
consideration that entitles Dongjin to rescission.

6 and

7 [T]he alter ego doctrine is to be applied such that Kim
shall be jointly and severally liable with Emailfund to
8 Dongjin for the \$800,000 compensatory damages awarded
against Emailfund on Dongjin's cause of action for
9 rescission based on failure of consideration.

10 Arbitration Award at 4-5. The Arbitration Award did not reach
11 Dongjin's allegations of fraud against Debtor and Emailfund,
12 finding:

13 Because the arbitrator has awarded Dongjin \$800,000 in
rescission damages based on failure of consideration, the
14 arbitrator need not, and does not decide whether Dongjin
is entitled to rescission damages based on fraud, or to
any other damages based on fraud. This is because even
15 were the arbitrator to determine that there was fraud,
Dongjin could not, pursuant to any of its fraud claims,
recover damages greater than the \$800,000 the arbitrator
16 has awarded Dongjin. (Dongjin does not assert that it is
entitled to greater than \$800,000 in compensatory damages
17 on either of its fraud claims.) Further, any award to
Dongjin on either claim for fraud would be duplicative
18 of, and overlap, the \$800,000 awarded.

19
20 Arbitration Award at 4. Although Dongjin had sought punitive
damages, the Arbitration Award indicates that such damages were not
21 available under AAA Rules. Id.

22
23

24 **C. Proceedings before this Court**

25 Shortly after the Arbitration Award was rendered, on
26 August 22, 2007, Debtor filed a motion to transfer his bankruptcy
27 case to the Northern District of California, on the basis that he
28

MEMORANDUM DECISION

1 now resided there. Arrow Declaration at ¶ 17. The order granting
2 this motion was entered on September 14, 2007. Id.

3 On October 22, 2007, Debtor filed a notice of voluntary
4 conversion to Chapter 7. Id. The Chapter 7 Trustee was appointed
5 on October 24, 2007.

6 On October 29, 2007, Debtor filed a notice of change of
7 address. Arrow Declaration at ¶ 18. According to the notice,
8 signed by debtor, his address was "Building 90, MC: 2155, Stanford
9 Quad, Stanford, CA 94305-2155." Id. Dongjin is informed and
10 believes this is actually a building housing the Philosophy
11 Department of Stanford University. Id.

12 This Adversary Proceeding was filed on January 31, 2008. On
13 February 7, 2008, one day after the service of the summons in this
14 Adversary Proceeding, Debtor filed a second notice of change of
15 address with the Court, which simply states as follows:

16 I hereby file a notice that as of this twenty-sixth day
17 of January 2008 I will not be any longer at the former
address Building 90, Stanford Quad, Stanford, CA 94305-
2155. As soon as I have a new address, I will notify you
18 of it.

19 On February 29, 2008, Debtor filed a motion to dismiss his
20 Chapter 7 case (the "Motion to Dismiss"). In the Motion to
21 Dismiss, Debtor disputed the arbitrator's authority and
22 jurisdiction over him personally in the underlying Arbitration with
23 Dongjin. Debtor argued that the parties never agreed to allow the
24 arbitrator to determine arbitrability. Debtor argued the
25 arbitrator exceeded his authority and, therefore, the Court should
26 refuse to enforce the Arbitration Award against him. The Motion to
27 Dismiss further states:
28

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1 Debtor will seek a judicial declaration from the
2 California State Court that Debtor is not validly a party
3 to the Arbitration and rulings of the arbitrator to the
4 contrary and any proceedings taken against Debtor are
void and of no force or effect, if Creditor seeks to
confirm the arbitral award against Debtor in the
California state court.

5 Motion to Dismiss at ¶ 8. Debtor argued that his bankruptcy case
6 is primarily a two-party dispute between himself and Dongjin. Id.
7 at ¶ 11. As such, per Debtor, no parties would be harmed by
8 dismissing this bankruptcy case.

9 To this Motion to Dismiss, Debtor attached (1) various letters
10 he sent to the arbitrator objecting to jurisdiction over him
11 personally³ and (2) a copy of a California identification card
12 issued on October 3, 2007, which includes the same address at
13 Stanford University. Debtor said in his Motion to Dismiss that he
14 was conducting research at Stanford, but no longer works there.
15 Motion to Dismiss at ¶ 16.

16 On March 7, 2008, the Court indicated it would not sign the
17 proposed order on the basis that the Court cannot grant the Motion
18 to Dismiss without a noticed hearing as required by Federal Rule of
19 Bankruptcy Procedure 1017.⁴ Despite instructions from the Court to
20 set this matter for hearing, Debtor has never done so.

21 Debtor has not filed a response in this Adversary Proceeding.
22 On April 11, 2008, the Clerk of the Bankruptcy Court entered a

23
24 ³ The Arbitration Award notes that "by Order dated December 6,
25 2004, the Arbitrator determined that Dr. Sangmun Kim, as an
individual, is a party to this arbitration as a respondent. As set
forth in that Order, Kim contended at that time that he had entered
into a written agreement to arbitrate, and that he was a party to
this arbitration." Arrow Declaration, Exhibit A at 2-3.
26
27

28 ⁴ See docket entry 101 in Chapter 7 case.

1 default against Debtor.

2 On May 12, 2008, the Court held a case management conference
3 in this Adversary Proceeding. The docket entry for this hearing
4 indicates the Court instructed Dongjin as follows: "Plaintiff is
5 instructed not to request a Default Judgment for 30 days to see if
6 Defendant files a new address, if new address isn't filed then
7 Plaintiff should serve Defendant at old address." On July 3, 2008,
8 Dongjin filed its Application for entry of default judgment against
9 Debtor. On July 29, 2008, Dongjin served the Application and its
10 supporting declarations on Debtor at the Stanford University
11 address. A review of the dockets for this Adversary Proceeding and
12 Debtor's main Chapter 7 case confirms that no notice of a new
13 address has been filed by Debtor.

14

15 **II.**

16 **ANALYSIS**

17 The proposed default judgment seeks relief under several
18 different code sections in an "and/or" alternative ruling.
19 Therefore, each code section cited must be considered separately.

20

21 **A. 523(a)(2)**

22 Section 523(a)(2) provides, in pertinent part, as
23 follows:

24 (a) A discharge under section 727...of this
25 title does not discharge an individual debtor
from any debt--

26 . . .

27 (2) for money, property, services, or an
28 extension, renewal, or refinancing of credit,

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to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(I) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive

A creditor must prove the elements of nondischargeability under § 523(a) by a preponderance-of-the-evidence standard. Grogan v. Garner, 498 U.S. 279, 286 (1991).

1. 523(a)(2)(A)

To except a debt from discharge under Bankruptcy Code § 523(a)(2)(A), the creditor must show: (1) the debtor made representations to the creditor; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditor (aka scienter); (4) the creditor justifiably relied on the representations; and (5) the creditor sustained the alleged loss and damage as the proximate result of the representations having been made. In re Eashai, 87 F.3d 1082, 1086 (9th Cir. 1996).

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1 As noted above, the Arbitration Award expressly declined to
2 address Dongjin's allegations of fraud by Debtor.⁵ However, the
3 evidence provided in the Lee and Bogeaus Declarations, as described
4 above, do tend to support each of these elements. Therefore,
5 default judgment can be entered against the debtor under
6 523(a)(2)(a).

7

8 **2. 523(a)(2)(B)**

9 To except a debt from discharge under 523(a)(2)(B), the
10 creditor must show: (1) it provided the debtor with money,

11

12 ⁵ To the extent that the Arbitration Award does address a
13 particular issue, it is entitled to res judicata and collateral
14 estoppel effect as to the parties to the arbitration. 6 Witkin,
15 California Procedure (5th ed. 2008) Proceedings Without Trial § 562,
16 citing State Farm Mut. Auto Ins. Co. v. Superior Court, 211 C.A.3d
17 5, 14, 259 C.R. 50 (1989) (collateral estoppel effect as to issues
18 "actually, necessarily, and finally" resolved in arbitration);
19 Thibedeau v. Crum, 4 C.A.4th 749, 755, 6 C.R.2d 27, 7 Cal. Proc.
20 (5th), Judgment, §362 (1992) (res judicata doctrine applies to
21 arbitration award, even though unconfirmed, barring subsequent
22 assertion of claims within scope of arbitration); Shell, Richard,
23 Res Judicata and Collateral Estoppel Effects of Commercial
24 Arbitration, 35 U.C.L.A. L. Rev. 623 (res judicata and collateral
25 estoppel effect).

26 As discussed at pages 9-10 infra, Debtor has suggested in
27 other pleadings that he was not properly a party to the
28 Arbitration. Debtor even suggested he would seek relief from the
California State courts when and if Dongjin seeks to confirm the
Arbitration Award and enforce it against Debtor. Motion to Dismiss
at ¶ 8. However, the time period within which Debtor may have
moved to vacate the Arbitration Award against him has long since
passed. California Code of Civil Procedure § 1288 provides that "a
petition to vacate an award or to correct an award shall be served
and filed not later than 100 days after the date of the service of
a signed copy of the award on the petitioner." The Arbitration
Award is dated July 9, 2007. If the party who lost in the
arbitration does not serve and file a petition to vacate within the
100-day period from the date of service of the award, the award
must be treated as final. Eternity Investments, Inc. v. Brown, 60
Cal.Rptr.3d 134, 151 Cal.App.4th 739 (Cal.App. 2 Dist. 2007).

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1 property, services or credit based on a written representation of
2 fact by the debtor as to debtor's financial condition; (2) the
3 representation was materially false; (3) the debtor made the
4 representation with the intention of deceiving the creditor; (4)
5 the creditor relied on the representation; (5) the creditor's
6 reliance was reasonable; and (6) damage proximately resulted from
7 the representation. In re Siriani, 967 F.2d 302, 304 (9th Cir.
8 1992); In re Candyland, 90 F.3d 1466, 1469 (9th Cir. 1996).

9 Again, although not addressed by the Arbitration Award, the
10 Lee and Bogeaus Declarations do tend to support each of these
11 elements. Therefore, a default judgment can be entered against
12 Debtor under 523(a)(2)(B).

13

14 **B. 523(a)(6)**

15 Section 523(a)(6) provides:

16 (a) A discharge under section 727...of this
17 title does not discharge an individual debtor
from any debt--

18 . . .

19 (6) for willful and malicious injury by the
20 debtor to another entity or to the property of
another entity.

21

22 A simple breach of contract is not the type of injury intended
23 to be covered by § 523(a)(6). In re Jercich, 238 F.3d 1202, 1205
24 (9th Cir. 2001); In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992).
25 Even an intentional breach of contract generally will not lead to
26 nondischargeability under § 523(a)(6) unless accompanied by
27 malicious and willful tortious conduct. Jercich, 238 F.3d at 1205;
28 Riso, 978 F.2d at 1154. The Arbitration Award obtained by Dongjin

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1 was on the basis of rescission of the contract for failure of
2 consideration. This does not appear to be the type of "willful and
3 malicious" conduct contemplated by 523(a)(6), and Dongjin has not
4 presented sufficient evidence to support such a finding.
5 Therefore, a default judgment should not be entered against the
6 debtor under 523(a)(6).

7

8 c. 727(a)(2)

9 Section 727(a)(2) provides:

10 (a) The court shall grant the debtor a
11 discharge, unless--
12 . . .

13 (2) the debtor, with intent to hinder,
14 delay, or defraud a creditor or an officer
15 of the estate charged with custody of
16 property under this title, has
17 transferred, removed, destroyed,
18 mutilated, or concealed--

19 (A) property of the debtor, within
20 one year before the date of the
21 filing of the petition; or

22 (B) property of the estate, after the
23 date of the filing of the petition

24 In this case, evidence has been submitted that Debtor diverted
25 \$742,000 belonging to EmailFund to BZ21, another corporation wholly
26 owned and controlled by Debtor, to himself and to an unknown
27 entity. Arbitration Award at 5. These transfers appear to have
28 occurred in 2001. Bogeaus Declaration at ¶ 34. To the extent that
the corporate veil has been pierced by the Arbitration Award, then
this would be a diversion of Debtor's property. However, these
transfers appear to have occurred roughly 6 years prior to the
filing of Debtor's current bankruptcy case. Since these transfers

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were not made within one year of the bankruptcy filing, Bankruptcy Code § 727(a)(2) is not applicable. There is no other evidence currently before the Court regarding transfers by Debtor just prior to his bankruptcy filing. Therefore, default judgment cannot be rendered in Dongjin's favor under 727(a)(2).

D. 727(a)(3)

Section 727(a)(3) provides:

(a) The court shall grant the debtor a discharge unless-

...
(3) the debtor concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case

Under 727(a)(3), the debtor's actions are analyzed under an objective standard. "[I]f the extent and nature of the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, she must show more than that she did not comprehend the need for them." In re Cox, 41 F.3d 1294, 1297 (9th Cir 1994). The mere failure to keep whatever books and records are objectively typical under the circumstances is enough to trigger the statute. It is not necessary that the failure have been based on a wrongful desire to conceal information or harm creditors. Id.

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1 Evidence has been submitted by Dongjin that Debtor failed to
2 maintain the business records of Emailfund. The arbitrator
3 specifically noted:

4 Emailfund's failure to observe corporate formalities and
5 maintain proper books and records. This includes
6 incomplete, inadequate ledgers, journals and other
7 accounting records, and falsified signatures on minutes
of what were claimed to be meetings of Emailfund's board
of directors.

8 Arbitration Award at 5. Per the Arbitration Award, there were no
9 payroll records and no employment contracts for Debtor or any other
10 officer of Emailfund. This evidence does support a denial of
11 discharge under 727(a)(3).

12
13 E. 727(a)(4)

14 Section 727(a)(4) provides:

15 (a) The court shall grant the debtor a
16 discharge unless--
17 . . .

18 (4) the debtor knowingly and fraudulently, in
19 or in connection with the case-

20 (A) made a false oath or account;

21 (B) presented or used a false claim;

22 (C) gave, effected, received, or
23 attempted to obtain money, property, or
advantage, or a promise of money,
property, or advantage, for acting or
forbearing to act; or

24 (D) withheld from an officer of the
25 estate entitled to possession under this
26 title, any recorded information, including
27 books, documents, records, and papers,
28 relating to the debtor's property or
financial affairs

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1 Per Bankruptcy Rule 4005, plaintiff bears the burden of
2 proving by a preponderance of the evidence that false oaths were
3 "knowingly and fraudulently" made, in or in connection with the
4 bankruptcy case. The mere making of a false oath in or in
5 connection with the bankruptcy case is not enough to deny discharge
6 under §727(a)(4). The false oath must have been made "knowingly
7 and fraudulently". In re Adeeb, 787 F.2d 1339 (9th Cir. 1986); In
8 re Devers, 759 F.2d 751 (9th Cir. 1985). Actual, and not merely
9 constructive, intent to defraud must be shown. In re Woodfield,
10 978 F.2d 516 (9th Cir. 1992). Such actual intent may be inferred
11 from the surrounding circumstances. Id. Thus, the nature of each
12 false oath made in or in connection with the case must be examined
13 in the context of the bankruptcy case to determine whether it
14 supports an inference that it was made "knowingly and
15 fraudulently", i.e., with the intent to defraud the court, the
16 trustee, or creditors.
17

18 The false statements that Dongjin has alleged Debtor has made
19 relating to this bankruptcy case are: (1) his address and (2) his
20 Schedules, which were vastly different from those filed in his
21 prior bankruptcy case roughly one year prior. With respect to the
22 issue of his address, Debtor has submitted a copy of a California
23 identification card with the same address as that used to establish
24 venue before this Court. With respect to the Schedules, a \$400,000
25 real estate property in Korea was eliminated along with its
26
27
28

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1 corresponding \$400,000 disputed secured debt owed to Dongjin. More
2 troubling, however, is the reduction of value of Debtor's personal
3 property from \$1,840,595 to \$207,050.⁶ Unsecured debts also shrank
4 from \$1,313,549.18 to \$803,500 (including the \$800,000 award to
5 Dongjin which was valued at \$800,000 in Debtor's 2006 Schedules but
6 is listed as an "unknown" amount in Debtor's 2007 Schedules).⁷
7 However, there was a one-year gap between the filing of the two
8 sets of schedules. Many things could have happened. Therefore, on
9 the scant evidence currently before the Court, a default judgment
10 under 727(a)(4) is not supported.

12
13 **F. 727(a)(5)**

14 Section 727(a)(5) provides:

15 (a) The court shall grant the debtor a
16 discharge unless--
17 . . .

18 ⁶ The bulk of this change in value of Debtor's personal
19 property is attributable to the devaluation by Debtor of stock
20 holdings in corporations formed by Debtor. In his 2006 Schedules,
21 Debtor valued his 2.9 million shares of Emailfund at \$510,000. In his
22 2007 Schedules, these same shares were valued at \$0. In his
23 2006 Schedule B, Debtor also listed 8.2 million shares in MobileBZ
24 (82% ownership) valued at \$700,000. The MobileBZ shares are not
25 listed in his 2007 Schedule B, which is dated 1 year and one day
after his 2006 Schedules. Likewise missing from his 2007 Schedule
B is a \$50,000 pension from Yonsei University. Debtor lists the
intellectual property of a "mathematics manuscript" in both sets of
Schedules, but the value decreases from \$574,000 in his 2006
Schedule B to \$200,000 in his 2007 Schedule B.

26 ⁷ The most significant change in Debtor's unsecured claims
27 was the elimination of a \$400,000 personal loan by Hwang Kyu of
Chunan, Korea was listed in Debtor's 2006 Schedule F, but not
28 listed in Debtor's 2007 Schedule F.

MEMORANDUM DECISION

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities

5 Section 727(a)(5) denies a discharge to a debtor who has
6 failed to explain satisfactorily any loss or deficiency of assets.
7 Whether an explanation is satisfactory must necessarily be
8 determined on a case by case basis. See In re Devers, 759 F.2d 751
9 (9th Cir 1985).

10 There has been no discussion of any kind about a loss of
11 assets by Debtor at this point. Dongjin has its suspicions, but
12 there is currently no evidence before the Court on this issue.
13 Therefore, on the evidence currently before the Court, default
14 judgment under 727(a)(5) is not appropriate.

III.

CONCLUSION

For the above stated reasons, the Application is granted. The Court shall enter a Default Judgment against Debtor, but only under the provisions of Bankruptcy Code §§ 523(a)(2) and 727(a)(3). The evidence currently before the Court does not support the entry of a default judgment under the remaining alternative bases

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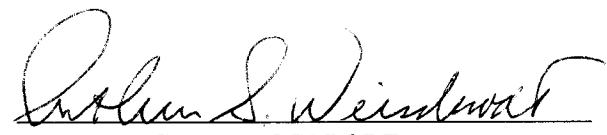
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MEMORANDUM DECISION

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 asserted by Dongjin, namely Bankruptcy Code §§ 523(a)(3),
2 523(a)(4), 523(a)(5), 727 (a)(2), 727 (a)(4) and 727(a)(5).
3

4 Dated: 12/22/08
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7 ARTHUR S. WEISSBRODT
8 UNITED STATES BANKRUPTCY JUDGE
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MEMORANDUM DECISION

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 Court Service List

2 Craig C. Chiang, Esq.
3 Buchalter Nemer
3 333 Market St., 25th Floor
4 San Francisco, CA 94105-2126

5 Sangmun Kim
6 aka Suang Muon Kim
6 Building 90, MC 2155
7 Stanford Quad
7 Stanford, CA 94305-2155

8 Carol Wu
9 Chapter 7 Trustee
9 25A Crescent Dr. #412
10 Pleasant Hill, CA 94523

11 Office of the U.S. Trustee
11 280 S. 1st St #268
12 San Jose, CA 95113

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MEMORANDUM DECISION